Charleston Nursing Center *and* Local 15-A, Retail, Wholesale, and Department Store Union, AFL-CIO. Cases 11-CA-8753 and 11-CA-8843

August 4, 1981

DECISION AND ORDER

On September 30, 1980, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge only to the extent consistent herewith and to adopt his recommended Order, as modified herein.

Respondent has excepted, *inter alia*, to the Administrative Law Judge's findings that Owner-Administrator Connelly's refusal to meet with a group of nurses aides on October 1, 1979, violated Section 8(a)(1) of the National Labor Relations Act and that the ensuing walkout of these nurses aides was therefore an unfair labor practice strike. Contrary to the Administrative Law Judge and for the reasons set forth below, we find that Respondent's refusal to meet did not violate the Act and that therefore the nurses aides were merely economic strikers. Respondent has also excepted to the Administrative Law Judge's finding that, even if the employees were simply economic strikers, Respondent's March 11, 1980, letter to all unreinstated strikers threatened employees with waiver of their rights to future employment in violation of Section 8(a)(1) of the Act. However, for the reasons set forth below, we agree with the Administrative Law Judge's finding that the March 11 letter violated Section 8(a)(1) of the Act.

The Refusal to Meet

The Administrative Law Judge made the following findings as to the events leading up to Respondent's refusal to meet with the group of nurses aides. During late September 1979, some of Respondent's nurses aides became dissatisfied with Respondent's failure to give them a pay raise which the nurses had received and about the lack of privacy in certain dressing rooms where there were no curtains. A group of at least four nurses aides met with Respondent's director of nursing, Rose Wolfe, to complain about these problems; however, Wolfe told the group that they would have to talk to Respondent's new owner-administrator, James Connelly, about their complaints. On Saturday, September 29, 1979, three nurses aides went to Connelly's office and asked a secretary, Emily Sanders, if they could meet with Connelly the following Monday. Sanders said that she could not set up such a meeting herself but she would talk to Connelly and get back to them. The same day, another nurses aide spoke to Connelly at the nursing home and requested that he meet with the nurses aides the following week. Connelly said he would hold a meeting on either Tuesday, Wednesday, or Thursday. Connelly also received a telephone call that day from a female employee who asked for a meeting. Connelly told the caller that he had to go out of town on Monday so the meeting would be scheduled on Tuesday, Wednesday, or Thursday. Connelly decided late on Saturday to hold a meeting of all employees (not just nurses aides) on Wednesday, October 3, 1979, since he thought that was the shortest time in which all employees could be notified of the meeting. Director of Nursing Wolfe posted a notice on the employee timeclock about this meeting at 8:30 a.m. on Monday, October 1, 1979.[2]

Over the weekend, a rumor had spread among the nurses aides that Connelly would meet with the nurses aides on Monday, October 1, 1979, if he were present at the nursing home.[3] Connelly was at the nursing home on Monday, and at about 3 p.m. a group of over 40 nurses aides went to Connelly's office.[4] Connelly met the group at the door to his office and asked what was happening. Several employees said they were there for a meeting with him. Connelly replied that he had not called a meeting for that day but a meeting of all employees

[1] In adopting the Administrative Law Judge's Decision in this case, Chairman Fanning and Member Jenkins do not rely on the Administrative Law Judge's statements of opinion in fn. 2 as to the merits of the settlement agreement urged by Respondent as a bar to this proceeding. These statements are unnecessary to their conclusion that it would not effectuate the purposes of the Act to defer to this settlement agreement. In reaching the conclusion not to defer to the settlement herein, Chairman Fanning does not rely on *Roadway Express, Incorporated*, 246 NLRB 174 (1979), Supplemental Decision 250 NLRB 393 (1980), enforcement denied 647 F.2d 415 (4th Cir. 1981), cited by the Administrative Law Judge. Although Chairman Fanning dissented in *Roadway Express*, he notes that, unlike the situation in *Roadway Express*, all parties did not agree to the settlement in this case and the settlement herein was not entered into pursuant to a binding grievance-arbitration procedure. Member Zimmerman finds it unnecessary to determine whether deferral to the settlement agreement is appropriate in light of the disposition of the complaint issues relating, *inter alia*, to the alleged refusal of Respondent to meet with a group of the nurses aides and the nature of the strike which followed. However, he concludes that the issue of whether Respondent's letter of inquiry to unreinstated strikers violated Sec. 8(a)(1) of the Act is, in any event, properly before the Board because such issue involves conduct occurring after the settlement and thus outside its scope.

[2] The shifts had already changed at 7 a.m., so most employees would have been unaware of this notice until at least the 3 p.m. shift change that day.

[3] The nurses aides who had spoken to Sanders on Saturday about an appointment with Connelly had mistakenly received this impression from Sanders and started this rumor.

[4] Respondent employed 53 nurses aides at this time.

had been scheduled for Wednesday and referred to the notice on the timeclock. Several employees responded that they did not want to meet with all the other employees on Wednesday, they wanted to meet with him immediately. Connelly said he was supposed to go out of town that afternoon and asked them to come back Wednesday or else he would meet with them individually right away. Daisy Nesbit, a nurses aide who had done some of the speaking for the group along with several other employees, then shook her finger at Connelly and said, "You white honky son-of-a-bitch, we will meet right now or else." Connelly told Nesbit she was fired for speaking to him that way. Several employees said that was not right and at least one employee said, "If she is fired then we are fired." The group of employees then started walking toward the timeclock, where most of them punched out and demanded their paychecks. After some argument, Connelly agreed to give them their paychecks if they would leave the facility, which they did. Connelly brought them their paychecks in the parking lot.

By October 4, 1979, five of the striking nurses aides had returned to work, and Respondent had permanently replaced the rest of the striking employees. By a letter dated October 5 and received by Respondent on October 8, 1979, all of the striking nurses aides requested reinstatement on the basis of seniority. On October 11, 1979, Respondent reinstated the four most senior striking nurses aides, including Daisy Nesbit, as an indication of good faith, despite the fact that their jobs were filled by permanent replacements at the time. The record reveals that by March 18, 1980, the date of the hearing in this case, Respondent had offered reinstatement to 23 additional strikers, 2 of whom refused the opportunity to return to work; however, there were 15 striking nurses aides who had not been reinstated as of that date.

The Administrative Law Judge found that the nurses aides were engaged in protected concerted activity when they went to Connelly's office on October 1, 1979; however, he also found that Respondent did not discharge any of the nurses aides in retaliation against their protected concerted activity. Rather, the Administrative Law Judge found that Connelly discharged Daisy Nesbit solely because she used an inflammatory expletive in speaking to him[5] and that the other nurses aides walked out to protest Connelly's refusal to meet with them. As stated above, we do not agree with the Administrative Law Judge's further finding that Connelly's refusal to meet with the nurses aides as a group violated Section 8(a)(1) of the Act.

While it is clear that Section 8(a)(1) prohibits an employer from retaliating against employees for engaging in protected concerted activities such as the presentation of grievances, it is also clear that generally an employer is under no obligation to meet with employees or entertain their grievances upon request where there is no collective-bargaining agreement with an exclusive bargaining representative requiring it to do so. *Swearingen Aviation Corporation*, 227 NLRB 228, 236 (1976), enfd. in pertinent part 568 F.2d 458 (5th Cir. 1978). Furthermore, it is not illegal for an employer in such circumstances to refuse to deal with the employees except on an individual basis. *Pennypower Shopping News, Inc.*, 244 NLRB 536, fn. 4 (1979). In this case, Respondent did not absolutely refuse to meet with the employees as a group, but merely refused to meet with the employees as a group at that time because of a prior commitment. Moreover, Connelly suggested reasonable alternatives in refusing the employees' request: he would either meet with the employees as a group at a specific time 2 days later or he would meet with some employees individually right then; however, the employees did not agree to either alternative. Therefore, under all of the circumstances of this case, we find that Respondent did not violate Section 8(a)(1) of the Act by refusing to meet with the nurses aides on October 1, 1979.

Inasmuch as we have found that Respondent did not commit any unfair labor practices which caused the walkout, we find that the nurses aides were engaged in an economic strike rather than an unfair labor practice strike. Accordingly, we shall not require Respondent to offer immediate reinstatement with full backpay to the strikers, all of whom were permanently replaced.[6]

The Letter to Strikers

On March 11, 1980, Respondent sent the following letter to all unreinstated strikers:

> Are you still interested in employment at Charleston Nursing Center as an Aide?
>
> Please check on bottom of this letter and return to me. Also, please send current phone number.

[5] No exception was filed to the recommendation of the Administrative Law Judge that the complaint be dismissed insofar as it alleges that Nesbitt's discharge was unlawful. Member Jenkins adopts that finding *pro forma*.

[6] The rights of economic strikers are governed by the Board's decision in *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert denied 397 U.S. 920 (1970). There is no allegation in this case that Respondent has failed to fulfill its obligations to the economic strikers under *Laidlaw*.

> Enclosed is a self addressed and stamped envelope.
>
> Sincerely,
> /s/ Rose Wolfe, R.N.
> Director of Nursing
>
> ———Yes, I am interested in employment
> ———No, I am not interested in employment
> ————————Phone Number
>
> If we do not receive a reply, we will assume you are not interested.

The Administrative Law Judge found that this letter violated Section 8(a)(1) of the Act, because it did not indicate that the strikers were entitled to immediate reinstatement as unfair labor practice strikers. However, the Administrative Law Judge further found that, even assuming the strike was only an economic strike, the letter violated Section 8(a)(1) of the Act because it was not merely a reasonable inquiry made by Respondent to update its information on the current telephone numbers and interest in reinstatement of the strikers but in addition implied that the strikers must affirmatively respond to the letter in order to retain their rights to reinstatement in the future. The Administrative Law Judge concluded that in effect the letter was a threat of waiver of the employees' rights to future employment. We agree with the Administrative Law Judge that the letter was a threat to cut off the statutory reinstatement rights of economic strikers, which violated Section 8(a)(1) of the Act.

It is clear that an employer may legally require an economic striker to affirmatively respond to a job offer or lose the right to reinstatement.[7] Further, the Board has indicated that an employer may periodically ask economic strikers for updated information as to their current interest in reinstatement. Thus, in *Brooks*,[8] where the Board held that the employer could not unilaterally terminate the reinstatement rights of economic strikers after 1 year, the Board noted that the employer had never requested the strikers to take any affirmative action to maintain their current status but stated further:

> [W]e see no reason why the Respondent cannot at reasonable intervals request the employees on the preferential hiring lists to notify it whether they desire to maintain their recall status.[9]

The Board later noted that *Brooks* placed the burden on the employer to initiate any such periodic requests for current information as to the employees' interest in reinstatement and found that the failure of economic strikers to renew their applications for reinstatement periodically did not constitute a waiver of their reinstatement rights.[10] However, the Board has not directly addressed the question of whether an employer may legally terminate an economic striker's reinstatement rights if the striker fails to respond to the employer's request for updated information.

Under *Laidlaw*,[11] the employer has the duty to seek out replaced economic strikers in order to give them notice that a position has become available, unless the employer can prove legitimate and substantial business justification for terminating their reinstatement rights. The Board does not require an employer to make periodic requests for current information. Rather, any periodic requests an employer may send to unreinstated strikers for updated information are merely for its own administrative convenience. The employer still has the affirmative duty to notify replaced strikers of job vacancies as they occur and of any possibility that their reinstatement rights may be terminated. While the employer may be entitled to rely on any information it does receive in response to such a periodic request, we do not see any legitimate and substantial business reason which would justify an employer in terminating an employee's reinstatement rights merely because the employee failed to respond to such a periodic request.

Any termination of reinstatement rights based on a failure to respond to such a periodic request would be premature inasmuch as no job vacancy existed at the time of the request. Further, the burden on the employer would be slight: it need only maintain a nonresponding employee's name on the preferential hiring list until he is offered reinstatement and either refuses or fails to respond to the job offer. The burden on the employee, however, is severe: termination of all reinstatement rights. Even if the employer did not actually follow through by terminating the employee's reinstatement rights, the employee might be deterred from inquiring about future openings. Therefore, we conclude that, although an employer may legally request replaced economic strikers to furnish cur-

[7] *Poultry Packers, Inc.*, 237 NLRB 250, 255 (1978); *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 636 (1973).

[8] *Supra*, fn. 7.

[9] 202 NLRB 634 at 637.

[10] *Vitronic Division of Penn Corporation*, 239 NLRB 45, 48 (1978), enforcement denied by an evenly divided court 630 F.2d 561 (8th Cir. 1979). In *Penn Corporation*, the Board held that economic strikers had not waived their rights to preferential recall by signing a reinstatement request form containing an acknowledgment that they must renew their request for reinstatement in 6 months and by then failing to renew their requests 6 months later. The Board noted that the employer had unilaterally included the acknowledgment in the form which it had required the employees to sign in order to effectively request reinstatement and that the employer never took any further action to notify the employees of the necessity of renewing their applications.

[11] *Supra*, fn. 6.

rent information about their interest in reinstatement, an employer may not require replaced economic strikers to respond to such a request or risk losing their reinstatement rights. Accordingly, we find that Respondent's letter of March 11, 1980, violated Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Charleston Nursing Center, Mt. Pleasant, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(a) and 2(a) and (b) and reletter the remaining paragraphs accordingly.

2. Substitute the following for relettered paragraph 1(a):

"(a) Threatening employees with waiver or discontinuance of their reemployment rights unless such employees reply to inquiries of Respondent."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten striking employees with loss or waiver of their reemployment rights if they fail to answer or reply to our letters requesting information from them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

CHARLESTON NURSING CENTER

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: Upon charges duly filed on November 15, 1979, and January 7, 1980, by Local 15-A, Retail, Wholesale, and Department Store Union, AFL-CIO (herein the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 11, issued his order consolidating cases and a consolidated complaint and notice of hearing dated February 14, 1980, against Charleston Nursing Center (herein the Company or the Respondent). The principal issue involved is whether, on October 1, 1979, the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act), by discharging certain of its employees for assertedly engaging in concerted activities protected by Section 7 of the Act. By its duly filed answer, the Respondent admitted certain jurisdictional allegations of the complaint but denied that it had engaged in any unfair labor practices.[1]

At the hearing, which was held before me in Charleston and North Charleston, South Carolina, on March 17-19, 1980, all parties appeared and were afforded full opportunity to be heard, to produce, examine, and cross-examine the witnesses, and to introduce evidence material and pertinent to the issues.[2] Following the close of the hearing, posthearing briefs have been received from counsel for the General Counsel and counsel for the Respondent, which have been duly considered.

Upon the entire record in the case, including arguments of counsel, and my observation of the demeanor of the witnesses,[3] I make the following:

[1] The Respondent also asserted, by way of affirmative defenses, that: (1) the alleged concerted activities of the individuals involved were rendered unprotected by failure to comply with the notice provisions of Sec. 8(g) of the Act; and (2) a certain settlement agreement entered into between the Respondent and the individuals following the October 1, 1979, incident, constituted a bar to any proceedings before the National Labor Relations Board.

[2] At the hearing, the Respondent continued to vigorously urge that the settlement agreement, previously referred to, should constitute a bar to the further prosecution of the complaint herein. Although I believed, and continue to believe, that, as a practical matter, there is considerable merit to the Respondent's argument due to the highly charged tensions which arose in connection with the incident involved herein, the Respondent's motion was denied. This was based primarily upon the factors that: (1) neither the General Counsel nor the Charging Party herein were parties to the settlement agreement, nor did they join or acquiesce in the Respondent's motion; and (2) the settlement agreement did not purport to resolve the statutory issue herein (see, e.g., *Roadway Express Incorporated*, 246 NLRB 174 (1979); see also *Community Medical Services of Clearfield, Inc., d/b/a a Clear Haven Nursing Home*, 236 NLRB 853 (1978)).

[3] In evaluating the testimony of each witness, I have relied specifically upon his (or her) demeanor; also, apart from considerations of demeanor, I have taken into account other factors such as inconsistencies in testimony, conflicting evidence, inherent probabilities, and interest in the outcome of the litigation. My failure to detail each of these is not to be deemed a failure on my part to have fully considered them. Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

FINDINGS AND CONCLUSIONS

THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[4]

At all times material, the Respondent operated a nursing home in a suburb of Charleston, South Carolina. The facility was composed of several wings, had 132 beds, and approximately 120 employees of which 53 were nurses aides.[5]

Near the end of September 1979,[6] some of the nurses aides became dissatisfied with some of their working conditions, which included failure to give them a pay raise which the nurses had received, and the failure to put up curtains in some of the dressing rooms at the center resulting in lack of privacy. At least one meeting was held among the nurses aides[7] and Director of Nursing Rose Wolfe, in which these complaints were aired. However, Wolfe did not respond favorably to the complaints, particularly with respect to any wage increase. She advised that the aides would have to take up that subject with James Connelly, the owner-administrator of the facility.[8] Accordingly, some of the nurses aides decided to attempt to set up a meeting with Connelly as soon as possible and, on Saturday, September 29, a committee of nurses aides composed of Claudia Nesbitt, Wilhelmenia Reid, and Blondeva Rippy went to Connelly's office for that purpose. However, Connelly was not there, and the group talked to an office secretary, Emily Sanders. The group asked if they could meet with Connelly the following Monday. Sanders replied that she had no authority to set up such a meeting with Connelly, but that she would be glad to talk with him about the subject and "get back to them."[9]

Connelly testified that he was present at the facility on Saturday, September 29, and had a conversation with Anne Scott, a nurses aide, who requested a meeting with him on behalf of the nurses aides the following week. He responded that he was in agreement with the suggestion, and told Scott that the meeting would be held either Tuesday, Wednesday, or Thursday, and notice thereof would be posted on the timeclock.[10] Connelly also stated that on the same day he received an anonymous telephone call from a woman who identified herself as an employee, who asked for a meeting (apparently on behalf of the nurses aides); that he replied affirmatively but stated that he had to go out of town on Monday so that the meeting would be scheduled on Tuesday, Wednesday, or Thursday. Connelly further testified that he made the decision on that Saturday night to set up a meeting among all employees for the following Wednesday since that was the earliest time which he considered that on appropriate notice could be given to all employees. Accordingly, he advised Wolfe early the following Monday morning to post a notice of such meeting on the timeclock. Wolfe testified that she posted such notice about 8:30 a.m. on Monday, October 1.[11] However, there is no evidence that the third-shift employees (who worked from 11 p.m. Sunday, September 30, to 7 a.m Monday, October 1), nor the employees who worked the 7 a.m. to 3 p.m. shift on October 1, saw the notice.

B. *The Confrontation on October 1 and its Aftermath*

As previously noted, the word spread among the nurses aides over the weekend that a meeting with Owner-Administrator James Connelly was to be held at the facility at 3 p.m. on Monday, October 1, assuming Connelly was present at the facility that day. Since he was present at the facility on the morning of October 1, and was doubtless seen by the nurses aides at that time, it might be reasonably inferred that this information was conveyed by word of mouth, i.e., by telephone, to those nurses aides who were not scheduled to work on that day, or were scheduled to work on the second and third shifts.[12] In any event, shortly before 3 p.m., a group of nurses aides gathered on the parking lot outside the facility.[13] The group was observed by director of nursing, Rose Wolfe, who testified that she went to the kitchen door which was adjacent to the parking area and asked "What in the world is going on?" She did not receive an answer except that, according to her testimony, Dolores Barker, an LPN, stated that it was time that the girls had a meeting, and that Barker was going to be their spokesman.[14] Wolfe then proceeded to the office area and asked Nancy Ott, administrator trainee, if anyone had called a meeting of which Wolfe was not aware. Ott replied that no one had called a meeting that day. Whereupon Wolfe advised Mrs. Connelly (who was an assistant to her husband) that the latter should "get Jim, we've got problems." Mrs. Connelly immediately notified her husband

[4] There is no issue in the case respecting the jurisdiction of the Board nor of the status of the Union as a labor organization. The complaint alleges sufficient facts, which are admitted by answer, upon which I may, and do hereby, find that at all times material the Respondent has been an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[5] The other employees were primarily nurses, licensed practical nurses, and office personnel. The primary duties of the nurses aides (who are the focus of this litigation) were to care for the patients, which included feeding them, cleaning up after them, etc.

[6] All dates hereinafter refer to the calendar year 1979, unless otherwise indicated.

[7] Some of the nurses aides who participated in these discussions were Mary Lawrence, Ester McManus, Mary Middleton, and Marilyn Huff.

[8] Connelly had only recently—in September—become the owner-administrator, and was, at the end of September, in the process of moving his family from his previous residence in Bennettsville, South Carolina, to Charleston.

[9] Although the record is unclear on the point, the nurses aides present at the interview with Sanders somehow received the impression that if Connelly was present at the facility on Monday, he would meet with them. Accordingly, that information traveled by word of mouth among the nurses aides over the weekend.

[10] Testimony of Connelly. Scott did not testify at the hearing.

[11] According to Wolfe's testimony, the notice established a meeting at 2 p.m. the following Wednesday for the second- and third-shift employees, and another meeting at 3 p.m. for the 7 a.m. to 3 p.m. shift.

[12] The record is clear that no one with managerial authority, or the secretary, Emily Sanders, scheduled a meeting between Connelly and the nurses aides at 3 o'clock on Monday, October 1.

[13] These nurses aides were composed of those who were either not scheduled to work on that Monday, and had driven to the facility in their street clothes, or those nurses aides who had completed their work on the first shift and were still in uniform.

[14] Testimony of Wolfe; Barker did not testify at the hearing.

who was having a telephone conversation in his office at the time.

In the meanwhile, at approximately 3 p.m., the nurses aide, entered the facility and walked as a group down the hall to the office area. When they reached Connelly's office, he met them at the doorway to the hall.[15] The first words spoken were those of James Connelly who asked, "What is going on, what is happening?" Several in the group responded that they were there for a meeting with him. Connelly replied that he did not call a meeting that day, but a meeting with all employees had been scheduled for Wednesday, and referred them to the notice on the timeclock. The response of the group to that statement was that they did not want to meet with all the other employees, that they wanted to meet with him, *now*.[16] Connelly's response to that was that he had to go—that he was "already supposed to have gone . . . ." He implored them to ". . . meet Wednesday, come back Wednesday, or I will be glad to meet with you individually right now."[17]

At that point, Daisy Nesbit, who was within a few feet of Connelly, pointed her finger at him and said, "You white honkey son-of-a-bitch, we will meet right now or else," and shook her finger at him. Connelly, who was apparently stunned at that remark, paused for a moment and said. "Lady, you can't talk to me that way in here, you are fired, go punch out."[18]

The group responded to the firing of Nesbit with exclamations such as "No, that is not right," or "No, that is not fair." Also, one or more in the group said, "If she is fired, we quit," or "If she is fired, then we are fired." Whereupon, the group turned around and started walking back down the hall.[19]

Daisy Nesbit testified that at the end of the confrontation with Connelly, she demanded her paycheck. Also, after the group of employees proceeded back through the facility to the timeclock to punch out,[20] some of the other employees demanded their paychecks. Connelly first took the position that he had, under the law, 48 hours to write the employees a check. However, the group of nurses aides did not greet that suggestion favorably, and became quite vociferous in demanding their money. Whereupon, Connelly told them if that they would leave the facility he would get their checks. Whereupon, the group of nurses aides gathered in the parking lot and Connelly, after receiving the timecards, directed Mrs. Connelly and Nancy Ott to start writing the checks. They did so, hurriedly, deducting only FICA but not Federal and State income taxes from the checks. After Mrs. Connelly and Nancy Ott made out a handful of checks, Connelly would hand-deliver them to the nurses aides in the parking lot, making approximately five trips back and forth.

C. *The Gun Incident*

When Connelly reached the parking lot with a handful of checks, as aforesaid, he would call out the names of the employees as they appeared on the checks. Not being familiar with the employees because of his recent connection with the Respondent, and because of poor handwriting, Connelly mispronounced some of the names. Also, because of the rush in the preparation of the checks, some of the amounts were not accurate. This led to further boisterousness and catcalls by the nurses aides, and the situation became more fraught with tension.

After about the second or third trip to the parking lot, Connelly, according to his testimony, was pushed down

[15] Also present with Connelly at this time were Mrs. Connelly, Nancy Ott, and Rose Wolfe. Across the hall in her office, with the door open, was the secretary, Emily Sanders.

[16] The record reflects that there was no particular spokesman for the group. Rather, it appears that there were several nurses aides near the front of the group (who had spread semicircular around the entrance to Connelly's office), who were, apparently, responding to the statement and question of Connelly. They were Gloria Venning, Dolores Barker, and Daisy Nesbit.

[17] Testimony of Connelly.

[18] Testimony of Connelly. Nesbit denied the statement attributed to her. Rather, she testified that when Connelly finished speaking, she raised her hand and said, "May I ask a question," and that Connelly looked directly at her and said, "No, you are fired." Her testimony in this respect is corroborated by the other nurses aides who were present at the time, and who testified on behalf of the General Counsel. On the other hand, Connelly's testimony is corroborated by the managerial and office personnel listed above who were present at the occasion. After giving the matter due consideration, I credit the version given by Connelly and the Respondent's witnesses. I am unable to believe that Nesbit, who impressed me as being a militant and somewhat arrogant person, in the context of this situation, would meekly and politely raise her hand and asked permission to ask a question. Nor do I believe it likely that Connelly, although he was doubtless, upset, and perhaps angry at the employees' attempt to impose a meeting upon him at a time when he did not wish one, would have discharged one of their number merely because she wished to ask a question.

[19] Daisy Nesbit testified that after some of the women in the group stated that it was not "right" that Nesbit be fired, Connelly said, "You all are fired, get out." Again, her testimony in this regard is corroborated by the other employees who were present at that time, and who testified on behalf of the General Counsel. Connelly denied that he made the statement attributed to him, or that in fact, any employee other than Daisy Nesbit was fired on this occasion. His testimony in this regard is, again, corroborated by those managerial and office personnel who testified on behalf of the Respondent. After due and full consideration, I credit the denials. In addition to demeanor, I have taken into consideration the following: (1) Daisy Nesbit was the only employee who received two paychecks –one indicating payment for hours worked and the other indicating payment for accumulated sick leave and/or vacation pay; (2) the testimony of Dorothy Connelly who, a few minutes later, told a maid, Geneiva Haywood, in response to the latter's question of whether she had been fired, "No, you are not fired, nobody has been fired" (of course, it is recognized and admitted that Daisy Nesbit had been discharged, but such statement stands in corroboration of Connelly's testimony that he did not fire anyone other than Nesbit); (3) the subsequent statement by the nurses aides on the signed, unconditional request for reinstatement in which the statement was made that such employees requested reinstatement ". . . to our jobs which we left as a protest over working conditions" (G.C. Exh. 2); and (4) the subsequent report of the police officer that day who stated that Dolores Barker advised him of the following sequence: ". . . one of the employees (Daisy Nesbit) went in to see John Connelly in reference to problems on the job and requested a meeting. John Connelly then told her that she was fired. At this time approximately 60 of the other employees (nurses aides) walked off and gathered in the parking lot." The report recited that it was later, while in the parking lot, that Connelly informed them that "they were all fired."

One would suppose that if, in fact, Connelly uttered the discharge language attributed to him by Nesbit and others of the group while in the hall some mention thereof would have appeared in the documents referred to in (3) and (4) above. Accordingly, based on all of the foregoing, I do not credit the testimony of the witnesses for the General Counsel in this regard.

[20] Apparently, most of the group of employees punched out although Gloria Venning testified that she was "not punching out because [she] didn't punch in."

by an unidentified person, from behind.[21] Apparently this incident put Connelly in fear, and he ran to his automobile which was parked in the parking lot and retrieved his pistol from the car. He waved it back and forth above his head in a manner that everyone could see it, and said that anyone who came closer would have to answer to the gun.[22] Connelly then grabbed his 9-year-old son who was watching the activities while sitting on a parked automobile, and shoved him back into the facility. Apparently the appearance of the firearm on that occasion quieted the group of employees since he delivered the balance of the checks to them on the parking lot, without the firearm, without incident.

Shortly thereafter, the local police appeared on the scene.[23] By the time the police arrived, the tension on the parking lot had apparently dissipated to a great extent. At the request of many of the nurses aides, the police officer asked Connelly if he would rewrite the checks which, as previously set forth, were in error. Connelly agreed to do so, and the checks were subsequently mailed to the employees. Meanwhile, volunteers were secured by the officials of the Respondent to assist with the care of the patients. Subsequently, within the next several days (and before any request for reinstatement was made on behalf of the nurses aides), the Respondent filled the job of the nurses aides with permanent replacements.

Also within the next several days, efforts were made to resolve the labor dispute through intervention of representatives of the South Carolina Department of Labor and the Charleston Ministerial Association. These efforts resulted in a letter being drafted by the ministers on October 5, addressed to Connelly, signed by 45 of the nurses aides, as follows:

> Dear Mr. Connelly:
>
> Please be advised that we, the undersigned employees request reinstatement to our jobs which we left as a protest over working conditions. We unconditionally request reinstatement in that our concern, like yours, is on behalf of the patients and tranquil labor conditions in the Charleston area.
>
> We further request reinstatement on the basis of seniority, and we look forward to working in a cooperative spirit with you.

The letter was delivered to Connelly on October 8, and several of the nurses aides, including Daisy Nesbit, were reinstated on October 11, as an indication of good faith on the part of the Respondent.[24]

The parties stipulated that as of March 18, 1980, 26 of the nurses aides named in the complaint had been recalled to work.

D. *The Alleged Threatening Letter*

On March 11, 1980, the Respondent sent all unreinstated employees the following letter:

> Are you still interested in employment at Charleston Nursing Center as an Aide?
>
> Please check on bottom of this letter and return to me. Also, please send current phone number.
>
> Enclosed is a self addressed and stamped envelope.
>
> Sincerely,
> /s/ Rose Wolfe, R.N.
> Director of Nurses
>
> Yes, I am interested in employment
>
> No, I am not interested in employment
>
> Phone number
>
> If we do not receive a reply, we will assume you are not interested.

It is the contention of the General Counsel that the nurses aides who were allegedly discharged or concertedly ceased work on October 1, retained their status as the Respondent's employees. It is his further contention that the purpose and effect of the above-quoted letter was to threaten the employees that, if they did not reply to the letter, they would, in effect, be considered as having waived their right to reemployment in the future. It is the contention of the Respondent that the letter did not constitute a threat but was merely a reasonable inquiry made by the Respondent to update addresses and telephone numbers so that the Respondent would know how to get in touch with that person at the time a position became open. This legal issue will be discussed, *infra*.

D. *Analysis and Concluding Findings*

1. The concerted activities

It is, of course, elemental and unrefuted that the discussions had among several of the nurses aides during the last week in September, respecting their working conditions at the Respondent's facility, constituted concerted activities protected by Section 7 of the Act. They conveyed their complaints first to director of nursing, Rose Wolfe, and then, receiving no satisfaction, sought to arrange a meeting with owner-administrator, James Connelly. While there is no evidence that anyone with managerial authority arranged a meeting between Connelly and the nurses aides to take place at 3 p.m. on Monday, October 1, it is apparent that several of the nurses aides understood that if Connelly were present at

[21] Connelly's testimony in this respect is not corroborated by any other person who was on the parking lot at the time. However, Connelly further testified that he scraped his hand in breaking his fall and showed it to his wife and others inside the facility.

[22] Credited testimony of Claudia Nesbitt and Cheryl Swinton. Connelly testified that he said, "Please don't come any closer. I don't want to hurt anybody, I don't want to shoot anybody." Under the particular circumstances existing at the time, I doubt if Connelly used the word "please." I find that Connelly did not point the gun at any particular person (see, e.g., testimony of Mary Lawrence, a witness for the General Counsel).

[23] The police were summoned by a call from Nancy Ott at the direction of Connelly. There was also evidence in the record that one or more of the nurses aides went across the street to a fire department, and it is probable that a call to the police department was made from that source also.

[24] See G.C. Exh. 4.

the facility at that time, he would meet with them. This understanding was spread by word of mouth among the nurses aides over the weekend so that a majority of them appeared at the facility shortly prior to that time for the purpose of airing their complaints as a group with him at the appointed time. Thus, it is clear that the concerted activity which commenced the previous week continued up to and including the confrontation with Connelly in the hallway at the facility at 3 p.m. on Monday, October 1.

As noted, the evidence does not show that Connelly was aware that the nurses aides desired a meeting with him at that time, and he was visibly upset when they became insistent that he meet with them. He sought to excuse his refusal to meet with them on the grounds that: (1) a meeting with all employees had been scheduled for the following Wednesday, and (2) he "should have been gone" out of town at that time. Nevertheless, as he apparently sensed the mounting tension and anxiety of the nurses aides, he suggested that he would meet with them individually.[25]

This adamant refusal by Connelly to meet with the nurses aides as a group at that time apparently provoked the inflammatory expletive of Daisy Nesbit. The language she utilized clearly provoked Connelly to terminate her, and I find that that conduct was the motivating reason behind her discharge and not because she had engaged in concerted activities.[26] Accordingly, I will recommend that the complaint as to Daisy L. Nesbit, be dismissed.

Although I have found that there is insubstantial evidence to prove that Connelly thereafter terminated all of the nurses aides present at the confrontation that day, it is clear that immediately subsequent to the discharge of Daisy Nesbit, the other nurses aides concertedly ceased work in protest. The question then arises as to the motivating cause of their conduct in this regard. The evidence shows that it was the discharge of Nesbit which clearly triggered their action; however, in the particular circumstances of this case, I view the motivating reason for their work stoppage to be Connelly's admitted refusal to meet with them as a group. This conduct was clearly an unfair labor practice,[27] and set in motion the ensuing events. Had Daisy Nesbit's remarks not been so inflammatory and provocative, she may not have been discharged and the whole subsequent sequence of events might have been different. Although this is a matter of conjecture, it is not conjecture that it was the Respondent's unfair labor practice which set in motion the circumstances which resulted in the concerted walkout of the employees.[28]

Further confirmation that the reason for the concerted activities of the nurses aides was in protest over working conditions as distinguished from the termination of Daisy Nesbit is found in the introductory paragraph of their October 5 letter to Connelly, quoted above. Accordingly, I find such walkout or strike to be causally related to the unfair labor practices of the Respondent, and therefore to be an unfair labor practice strike rather than an economic one.[29]

It is noted that Connelly's reason for refusal to meet with the nurses aides as a group as distinguished from meeting with them individually was because, as he testified: "I had already determined, at least determined in my mind that that wasn't a group, that was a mob." I find that there was insubstantial overt or objective evidence regarding the conduct of the nurses aides at that point in time to justify Connelly's characterization of the group. Nor did he request that they appoint several of their number as a committee to meet with him at that time or later.[30] Finally, I do not believe that Connelly's offer to meet with all employees, including the nurses aides, the following Wednesday was an adequate substitute or justification for his refusal to meet with them on Monday. Certainly they viewed their grievances as distinct from those of the nurses. Indeed, their principal complaint was that they did not receive a wage increase when the nurses received theirs.

2. The gun incident

The complaint, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the Act by Connelly's threat "to shoot employees because said employees engaged in protected concerted activity." Clearly, acts of violence or threats of violence engaged in by agents of an employer directed to employees who are engaging in activities protected by Section 7 of the Act, which may be said to have a purpose of interfering with, restraining, or coercing employees for so engaging in the exercise of such rights, constitute a violation of Section

[25] As Connelly testified, "I said that we are going to talk about it on Wednesday; or I would talk to them individually. I thought that that covered it."

[26] I note that he did not terminate any of the other nurses aides who were doing some of the talking on behalf of the group in the hall that day, such as Gloria Venning.

[27] It is well settled that an employer may not refuse to discuss wages, hours, or working conditions with a group of its employees in favor of meeting with them individually since such conduct is antithetical to concerted activity protected by Sec. 7 of the Act. Nor does it make a difference that the time chosen by the employees might be inconvenient to the employer since ill judgment or lack of consideration do not convert such otherwise legal conduct to illegality or immunize the employer from a finding of unfair labor practice (see, e.g., *N.L.R.B.* v. *Solo Cup Company*, 237 F.2d 521, 526 (8th Cir. 1956); *Magna Visual*, 213 NLRB 162, 167 (1974), and cases cited).

[28] I view the situation in the instant case to be similar to that in *Dobbs Houses, Inc.*, 135 NLRB 885, 888 (1962), enforcement denied 325 F.2d 531 (5th Cir. 1963), where the Board found a walkout to be "caused" by an accumulation of grievances although "triggered" by the discharge of a supervisor. The court found that there was not substantial evidence to support the Board's findings in that case.

[29] It is recognized that the complaint herein does not specifically allege Connelly's refusal to meet with the group as an independent unfair labor practice although it is alleged, alternatively, that the above-described conduct on the part of the Respondent on October 1 converted the strike of employees to an unfair labor practice strike. In any event, the matter is a material issue which was fully litigated at the hearing and therefore may provide an ample basis for the findings and conclusions herein, whether or not it was specifically pleaded (see, e.g., *American Boiler Manufacturing Association* v. *N.L.R.B.*, 366 F.2d 815, 821 (8th Cir. 1966), and cases cited therein).

[30] Cf. *N.L.R.B.* v. *Condenser Corporation of America*, 128 F.2d 67, 77 (1942), where the Court of Appeals for the Third Circuit stated: "Employees cannot insist that their demands be met in the middle of a working day, when the employer has promised to deal with them *as a group* at the end of the day." (Emphasis supplied.)

8(a)(1) of the Act. The issue here is whether the conduct of Connelly on this occasion falls within such test.

I have found that the situation on the parking lot of the Respondent's facility on the afternoon of October 1 was fraught with tension and potential violence. The employees were, at that time, displeased and enraged because of Connelly's refusal to meet with them, coupled with his discharge of one of their number. His mispronouncing of their names further enraged them, and resulted in taunting and catcalls. Finally, I have found that he was pushed down behind by an unidentified employee. This conduct clearly placed Connelly in fear of bodily harm, and resulted in his decision to secure his firearm, which he did. Substantial evidence shows that upon securing of the pistol, he held it in the air and waived it back and forth so that everyone present could see it, and stated that anyone who came closer to him would have to answer to the gun.

I conclude and find that the foregoing sequence of events does not constitute substantial evidence that Connelly threatened to shoot employees for their engagement in activities protected by Section 7 of the Act. Rather, I find his conduct on this occasion to be a response or reaction to the boisterous and threatening conduct of the group which reasonably placed him in fear of bodily harm. I note the absence of any other statements or conduct on his part which could be construed as a threat of interference, restraint, or coercion with the employees' Section 7 rights. Under all circumstances, I shall therefore recommend that this allegation of the complaint be dismissed.[31]

3. The alleged threatening letter

The complaint, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the Act through the sending of the March 11, 1980, letter, quoted above, to all unreinstated employees, in that the letter threatened such employees with loss of jobs because they engaged in protected concerted activities.

Of course, the letter was premised upon the assumption that employees were engaged in an economic strike. However, I have found that the strike was caused by the Respondent's unfair labor practices, and therefore was, and continued to be, an unfair labor practice strike. Therefore, the employees were entitled to their jobs upon the unconditional request therefore on October 5. But assuming the strike to have been economic in character, I would agree with the contentions of counsel for the General Counsel that the Respondent's March 11, 1980, letter violated Section 8(a)(1) of the Act. Thus, it exceeded a legitimate inquiry by an employer as to the current address, telephone number, and interest of the employee in employment with the Respondent. It is settled law that an economic striker remains an employee of the employer at least until he has secured other desirable employment, and is under no obligation to reaffirm such status at regular intervals. Accordingly, I agree that the March 11 letter constituted, in effect, a threat of waiver of the employee's right to future employment in violation of Section 8(a)(1) of the Act.[32]

4. The Respondent's 8(g) defense

In its answer to the complaint, the Respondent alleges that the concerted action of the nurses aides was in violation of the notice provisions of Section 8(g) of the Act, so as to make such actions unprotected. I do not agree with such contentions.

Section 8(g) of the Act requires that a labor organization, before engaging in any strike, picketing, or other concerted refusal to work at any health care institution, shall, not less than 10 days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. In a recent case,[33] the Board held that Section 8(g) does not apply to a work stoppage at a health care institution in which no labor organization is involved. Accordingly, this defense of the Respondent is without merit.[34]

Upon the basis of the foregoing findings of fact, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. By failing and refusing to meet with its employees as a group on October 1, 1979, to discuss complaints and grievances concerning their working conditions, the Respondent violated Section 8(a)(1) of the Act.
4. By threatening its employees with waiver of their reemployment rights if they did not respond to the questions posed in the Respondent's March 11, 1980, letter, the Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The work stoppage or strike engaged in by certain of the Respondent's employees commencing October 1, 1979, was caused by the unlawful conduct of the Respondent described in paragraph 3, above, and is therefore an unfair labor practice strike.
6. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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[31] See, e.g., *Cosmo Graphics, Inc.*, 217 NLRB 1061, 1066 (1975); *Cabot Corporation and Payne and Keller of Louisiana, Inc.*, 223 NLRB 1388, 1391 (1976).

[32] See *Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408 (1975), enfd. in part 542 F.2d 18 (6th Cir. 1976).

[33] *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630 (1977).

[34] In the light of the Board's decision in the cited case, I do not reach the further issue of whether the notice provisions of Sec. 8(g) would apply where the work stoppage is caused by the employer's unfair labor practices. Cf. *Cedarcrest, Inc.*, 246 NLRB 870 (1979).

Having found that the work stoppage or strike commenced on October 1, 1979, was an unfair labor practice strike from its inception because of the Respondent's unlawful refusal to meet with the group of its employees, it will be recommended that the Respondent offer to those strikers immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, persons hired on or after October 1, 1979. The Respondent shall make such strikers whole for any loss of earnings they may have suffered as a result of the Respondent's refusal to reinstate them in a timely fashion, by paying to each of them a sum of money equal to that which she would have earned as wages after the date of such unconditional offer to return to work[35] to the date of the Respondent's offer of reinstatement, less any net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[36]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[37]

The Respondent, Charleston Nursing Center, Mt. Pleasant, South Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to meet with groups of its employees for the purpose of discussing complaints or grievances concerning their wages, hours, or working conditions.

(b) Threatening employees on strike with waiver or discontinuance of their employee status unless such employees reply to inquiries of the Respondent.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon application, and to the extent that it has not already done so, the Respondent shall reinstate the unfair labor practice strikers and make them whole for any loss of earnings that they may have incurred, in the manner set forth in the section of this Decision entitled "The Remedy."[38]

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary and relevant to analyze and compute the amount of backpay due under the terms of this recommended Order.

(c) Post at its Mt. Pleasant, South Carolina, facility, copies of the attached notice marked "Appendix."[39] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to alleged violations of the Act not found in this Decision.

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[35] I have found that the strikers made an unconditional offer to return to work through their letter to Connelly dated October 5, which he received on October 8.

[36] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[37] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[38] As set forth above, the strikers made an unconditional application for reinstatement by letter dated October 5. The Respondent rejected immediate reinstatement except for four of them since it had hired permanent replacements prior to their offer. However, since it has been found that the strike was an unfair labor practice strike, the Respondent was obligated to reinstate them upon their unconditional application therefor, dismissing, if necessary, the replacements. Since the Respondent rejected the unconditional offer to return to work, no 5-day period will be provided prior to the commencement of the running of backpay. See *Newport News Shipbuilding & Dry Dock Company*, 236 NLRB 1637, 1638 (1978), *Climate Control Corporation*, 251 NLRB 751 (1980).

[39] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."